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9 S.D. DEACON OF CALIFORNIA

10  
11 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
12 FOR THE CENTRAL VALLEY REGION  
13

14 In the Matter of:

15 DONAHUE SCHRIER ASSET  
16 MANAGEMENT CORPORATION  
17 FOR ROCKLIN CROSSINGS,  
18 PLACER COUNTY, Administrative Civil  
19 Liability Complaint No. R5-2013-0519

ACLC No. R5-2013-0519

**S.D. Deacon's Submission of Evidence and  
Policy Statements and Designation of  
Witnesses**

20 Pursuant to the Advisory Team's Hearing Procedures, the designated parties were  
21 required to submit witness designations, evidence and policy statements, including following  
22 information:

- 23 1. All evidence (other than witness testimony to be presented orally at the  
24 hearing) that the Designated Party would like the Central Valley Water Board to consider.  
25 Evidence and exhibits already in the public files of the Central Valley Board may be  
26 submitted by reference, as long as the exhibits and their location are clearly identified in  
27 accordance with California Code of Regulations, title 23, section 648.3. Board members  
28 will not generally receive copies of materials incorporated by reference unless copies are  
provided, and the referenced materials are generally not posted on the Board's website.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the Designated Party intends to

1 call at the hearing, the subject of each witness' proposed testimony, and the estimated  
2 time required by each witness to present direct testimony.

3 4. The qualifications of each expert witness, if any.

4 **I. S.D. DEACON'S EVIDENCE AND EXHIBITS**

5 The following exhibits and evidence, authenticated and attached to the Declaration of  
6 Andy Van Veldhuizen filed herewith, are being submitted by S.D. Deacon<sup>1</sup>:

7 A. Site map delineating the pre-incident SWPPP map into several sub-shed areas.

8 B. Copies of the Rain Event Action Plans (REAPs) prepared by TSM on November  
9 26-29, 2012 in preparation for the storm event discussed in the ACL Complaint.

10 C. Rain Gauge Log Sheet for the Rocklin Crossings site for November 1, 2012 to  
11 December 5, 2012 and other rainfall information.

12 D. State Water Resources Control Board's Enforcement Policy adopted in 2009 and  
13 approved for state law purposes on May 20, 2010 (taken from SWRCB's website at  
14 [http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_final111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf), last accessed on September 4, 2013.)<sup>2</sup>

16 E. ACL Complaint No. R5-2013-0520 ACL issued by the Central Valley Regional  
17 Water Quality Control Board to HBT of Saddle Ridge LLC for the Cascade Crossing  
18 construction site on March 4, 2013, which was downloaded from the site:

19 [www.swrcb.ca.gov/.../cascade\\_crossing/r5-2013-0520\\_enf.pdf](http://www.swrcb.ca.gov/.../cascade_crossing/r5-2013-0520_enf.pdf) and Attachment A from  
20 downloaded from the site:

21 [http://www.swrcb.ca.gov/rwqcb5/board\\_decisions/tentative\\_orders/cascade\\_crossing/r5-2013-0520\\_att\\_a.pdf](http://www.swrcb.ca.gov/rwqcb5/board_decisions/tentative_orders/cascade_crossing/r5-2013-0520_att_a.pdf) (last accessed on September 4, 2013), and for which S.D. Deacon  
22 requests official notice be taken.

24 F. ACL Complaint No. R8-2010-0024 issued to the Placentia-Yorba Linda Unified  
25 School District on June 10, 2010, which was downloaded from the following website:

26  
27 <sup>1</sup> S.D. Deacon also incorporates by reference the exhibits, evidence and arguments submitted by Donahue Schriber.

28 <sup>2</sup> This Policy is more akin to a regulation than evidence in this matter, thus S.D. Deacon requests official notice be taken of the existence and content of this Policy.

1 [http://www.swrcb.ca.gov/rwqcb8/board\\_decisions/adopted\\_orders/orders/2010/10\\_024\\_ACL](http://www.swrcb.ca.gov/rwqcb8/board_decisions/adopted_orders/orders/2010/10_024_ACL)  
2 [C\\_Placentia-Yorba\\_Linda\\_USD.pdf](http://www.swrcb.ca.gov/rwqcb8/board_decisions/adopted_orders/orders/2010/10_024_ACL) (last accessed on September 4, 2013), and for which S.D.  
3 Deacon requests official notice be taken.

4 G. ACL Complaint No. R8-2010-0023 issued to EI-PLA 75, LLC on May 27, 2010,  
5 which was downloaded from the following website:

6 [http://www.waterboards.ca.gov/rwqcb8/board\\_decisions/adopted\\_orders/orders/2010/10\\_025](http://www.waterboards.ca.gov/rwqcb8/board_decisions/adopted_orders/orders/2010/10_025)  
7 [\\_ACLC\\_EI-PLA75LLC.pdf](http://www.waterboards.ca.gov/rwqcb8/board_decisions/adopted_orders/orders/2010/10_025) (last accessed on September 4, 2013), and for which S.D. Deacon  
8 requests official notice be taken.

9 H. SWRCB Order No. 2009-0009-DWQ, amended by 2010-0014-DWQ & 2012-  
10 0006-DWQ, located from

11 [http://www.waterboards.ca.gov/water\\_issues/programs/stormwater/docs/constpermits/wqo\\_20](http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_20)  
12 [09\\_0009\\_complete.pdf](http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_20) (last accessed on September 4, 2013), and for which S.D. Deacon  
13 requests official notice be taken.

## 14 **II. LEGAL AND TECHNICAL ANALYSIS AND ARGUMENT**

### 15 **A. FACTUAL BACKGROUND**

16 S.D. Deacon provides general contractor services to the Legally Responsible Person  
17 (LRP) and site owner Donahue Schriber for the Rocklin Crossings construction site. (*See*  
18 Declaration of Andy Van Veldhuizen (Van Veldhuizen Decl.) at ¶ 3.) The Qualified SWPPP  
19 Developer (QSD) for this site was Daniel Taylor of RSC Engineering and the Qualified SWPPP  
20 Practitioner (QSP) for the site was Dave Clayson of Total Site Maintenance (TSM). (*Id.*) The  
21 QSD was responsible for the day-to-day upkeep of the site's Storm Water Pollution Prevention  
22 Plan (SWPPP) and any required SWPPP amendments; while the QSP was responsible for  
23 observation and inspection activities, required sampling, and providing sediment and erosion  
24 control recommendations. (*Id.*)

25 Stormwater discharges from this site are regulated by the General Permit for Storm Water  
26 Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-  
27 DWQ, as amended by Order No. 2010-0014-DWQ, issued by the California State Water  
28

1 Resources Control Board (hereinafter "Construction Stormwater General Permit"). (Van  
2 Veldhuizen Decl. at ¶ 4; Exhibit H.) Notices of Intent (NOIs) to be covered under the  
3 Construction Stormwater General Permit were submitted by the LRP in mid-July of 2012. (*See*  
4 *id.*; *see also* Prosecution Team Exhibits 27, 32, 50, 57, 59, 66, 83 and 84.) The original SWPPPs  
5 for this construction site, dated July 11, 2012, were prepared by RSC Engineering. (*See id.*; *see*  
6 *also* Prosecution Team Exhibits 31, 49, 67, and 82.) The SWPPPs were submitted, as required by  
7 the Construction Stormwater General Permit, to the Regional Quality Control Board for the  
8 Central Valley Region (Regional Board) via the Storm Water Multiple Application and Reporting  
9 Tracking System (SMARTS). (*Id.*; *see also* Prosecution Team's Evidence List, indicated these  
10 were "Documents located in SMARTS Database.")

11 The Rocklin Crossings construction site consists of approximately 50.4 acres and is  
12 located on the southeast corner of Interstate 80 and Sierra College Boulevard in Rocklin,  
13 California. (Van Veldhuizen Decl. at ¶ 5.) The main project site is located approximately 1,000  
14 feet north of Secret Ravine. (*Id.*) Prior to construction, storm water runoff generated from the site  
15 sheet flowed into a number of offsite ephemeral drainages that ultimately discharged into Secret  
16 Ravine. (*Id.*)

17 Since the commencement of construction, the site has been mass graded into two onsite  
18 watersheds, Shed A and Shed B (*See* Van Veldhuizen Decl. at ¶6; Exhibit A (Site Map)). Until  
19 mid-December 2012, Shed A sheet-flowed in a north to south direction, to numerous low spots,  
20 where any accumulating water was then pumped to Basin A to allow for settlement prior to  
21 discharge. (*Id.*) Shed B also sheet-flowed to various low spots and then was captured, pumped  
22 and transported to Basin A. Basin A then discharged indirectly to Secret Ravine. (*Id.*)

23 Throughout the site, good housekeeping BMPs were deployed, such as those listed below,  
24 and good housekeeping practices were followed to ensure storm water runoff did not come into  
25 contact with waste or hazardous materials. (Van Veldhuizen Decl. at ¶ 7.)

- 26 • A self-contained tire wash was installed at the entrance.
- 27 • All sanitation facilities were located away from watercourses and storm drains, and  
28 were placed in a manner that they could not easily be knocked over by equipment or

1 vehicles.

- 2 • Waste disposal containers were covered.
- 3 • Hazardous and waste materials were stored in a manner that would eliminate the
- 4 potential for these materials to come into contact with storm water runoff.

5 In addition, other BMPs were in place including, among other things, sediment control  
6 BMPs. (Van Veldhuizen Decl. at ¶ 8.) The site had been inspected by Regional Board staff and  
7 S.D. Deacon was in regular communication with Regional Board staff about activities and BMPs  
8 at the site. (*Id.*) When substantive modifications to the SWPPP were made or BMPs needed to  
9 be altered substantially, revisions to the SWPPP were uploaded to SMARTS. (*See id.*; *see also*  
10 Prosecution Team Exhibits 39-41, 43, and 70.)

11 Prior to the storm event at issue, Rain Event Action Plans (REAPs) were prepared. (*See*  
12 Van Veldhuizen Decl. at ¶ 9; Exhibit B.) The events in question took place on November 30th,  
13 2012. (Van Veldhuizen Decl. at ¶ 9.)

14 During the 23-hour period leading up to these events, beginning 8:00 AM on November  
15 28th and ending 7:00 AM on November 29th, the rain gauge present on the site indicated that the  
16 site had received 0.75 inches of rain. (Van Veldhuizen Decl. at ¶ 10; Exhibit C.) During the  
17 inspection that occurred the morning of November 29th, the BMPs implemented on the site were  
18 effectively controlling the discharge of sediment from the site. (Van Veldhuizen Decl. at ¶ 10.)  
19 The Contractor performed BMP maintenance as necessary and continued pumping operations,  
20 removing water from low containment areas to transport sediment laden water to Basin A. (*Id.*)

21 During the 96-hour period, starting at 5:00 AM on November 30th through 7:00 AM  
22 December 2nd, the site received an additional approximately 6.25 inches of rain. (Van  
23 Veldhuizen Decl. at ¶ 11.) During an inspection that occurred at 5:30 AM on November 30,  
24 2012, it was observed that although heavy rain was occurring, the BMPs and runoff control  
25 measures on the site were effectively managing storm water runoff and controlling the discharge  
26 of sediment. (*Id.*)

27 By 8:00 AM, the storm event overwhelmed the BMPs at the site since the storm was large  
28 enough to exceed the 5-year, 24-hour Compliance Storm Event size identified in the Construction

1 Stormwater General Permit.<sup>3</sup> (See Veldhuizen Decl. at ¶ 13; *see also* Exhibit K (RSC Summary  
2 Memo) at p. 2 (“the average rainfall intensity experience the morning of November 30  
3 significantly exceeded the average intensity of a 5 year-24 hour storm....the documented storm  
4 intensity exceeds the average storm intensity of a 25 year, 24 hour storm event.”).)

5 Due to the very heavy rain and associated storm water accumulation, at one location  
6 located near Basin A a constructed berm breached, resulting in sediment laden water  
7 overwhelming a protected outlet culvert located on the south side of the as yet to be constructed  
8 detention basin. Immediately upon the identification of this issue, repairs to the berm were  
9 initiated and the culvert was plugged to prevent future discharges. (Van Veldhuizen Decl. at ¶  
10 12.)

11 While the Contractor was addressing the berm breach, the containment area located at the  
12 west end of Dominguez Loop also began to become overwhelmed due to the severe rains the site  
13 was experiencing. (Van Veldhuizen Decl. at ¶ 13.) Normally, runoff accumulating in the  
14 containment area was pumped into a water truck that then transported the water to Basin A. (*Id.*)  
15 However, due to the heavy amount of rainfall occurring in a short period of time, the containment  
16 area was overwhelmed resulting in the discharge of water that caused eventual eroding of an  
17 earthen dike that had been constructed to prevent storm water runoff from leaving the site. (*Id.*)  
18 Immediate efforts were initiated to repair the dike, and the flow of storm water runoff was  
19 partially stopped by 10:00 a.m. when the rock berm was reconstructed, and completely halted just  
20 over an hour later at approximately 11:15 a.m. (*Id.*) As a temporary measure, the dike was  
21 immediately protected with Visquine. (*Id.*) The Contractor had also immediately contacted a  
22 subcontractor to request the instantaneous deployment of a dozer to re-grade the dike higher and  
23 wider. Re-grading of the dike began at 11:00 AM. (*Id.*) By the end of the day, on November 30,

24  
25 <sup>3</sup> Under the Construction Stormwater General Permit, Risk Level 3 discharges are exempt from receiving water  
26 monitoring to determine compliance with Numeric Effluent Limitations, including those for turbidity, if rainfall is  
27 equal to or greater than a 5-year, 24-hour storm. (See Exhibit H (Permit) at p. 30, Provision V.C.3.) Arguably, a  
28 Risk Level 2 site, such as Rocklin Crossings (*see* Prosecution Team Exhibits 30, 56, 63, and 79), should be exempt  
from compliance with Numeric Action Levels in a similar size storm event. Case law has recognized that larger  
storm events may exceed “the capacities of available BMPs to minimize discharges.” (See *accord California*  
*Building Industry Association v. SWRCB*, Judgment in Case No. 34-2009-800000338-CU-WM-GDS at p. 9, lines 23-  
25; *see also* Exhibit H (Permit) at 25-26 (upset defense).)

1 2012, the dike had been completely reconstructed. (*Id.*) Much of the sediment that left the site  
2 was stopped by heavy vegetation prior to reaching Secret Ravine and, where accessible, this  
3 sediment was protected with straw blankets, straw wattles, rock bags, and hydro-seeding. (Van  
4 Veldhuizen Decl. at ¶ 14.)

5 In addition to the dike repair, the Contractor also ordered a 6-inch pump to be delivered  
6 the following day (December 1, 2012). (Van Veldhuizen Decl. at ¶ 15.) This larger pump was  
7 used to pump water from the containment area, located within Dominguez Loop, to Basin A. (*Id.*)  
8 The 6-inch pump was on site by 7:00 AM on December 1, 2012, the day after the incident. (*Id.*)  
9 Pumping began by 9:30 AM and was continued through the weekend. (*Id.*)

10 To eliminate the potential for further discharges of sediment, the Contractor worked  
11 diligently to implement additional BMPs on the site. (Van Veldhuizen Decl. at ¶ 16.)  
12 Immediately after the event, a long term corrective action strategy was developed and provided to  
13 Regional Board staff on December 10, 2012, that included:

- 14 • The construction of an additional basin to increase storm water storage capacity.
- 15 • Placement of additional pumps and associated piping to transport water to the basin.
- 16 • The implementation of a phased grading plan to make the site more manageable in regards to management of storm water runoff.
- 17 • The application of additional erosion control measures.
- 18 • Construction of all-weather access roads.
- 19 • Obtaining additional support from storm water consultants (Supplemental QSP) as a QA/QC oversight of the contracted QSP and QSD to review and supplement the SWPPP. (*Id.*)

21 In addition, on the day of the incident, November 30, 2012, the Contractor contacted  
22 Active Treatment Systems, Inc. to provide an Active Treatment System (ATS) to treat storm  
23 water generated from the site. (Van Veldhuizen Decl. at ¶ 17.) Between December 5-10, 2012, a  
24 second basin, Basin B, was also constructed to provide additional onsite storage. (*Id.*) Runoff  
25 was pumped to Basin B for holding and then transferred to Basin A for treatment by the ATS.  
26 (*Id.*) Active Treatment Systems, Inc. prepared an ATS Plan that was submitted to the Regional  
27 Board for approval per the requirements of the Construction Stormwater General Permit. (*Id.*)  
28 The system described in the ATS Plan and implemented on site was designed to accommodate a

1 10-year, 24-hour storm event (4 inches of rain) and drain in less than 72-hours. (*Id.*) The ATS  
2 Plan was uploaded to SMARTs on December 11, 2012 (Prosecution Team Exhibit 33) and  
3 approval of the plan was obtained from the Regional Board on December 12, 2012. (*Id.*)  
4 Deployment of the ATS was on December 10, 2012 and the system was fully operational on  
5 December 18, 2012. (*Id.*) The ATS discharged indirectly to Secret Ravine. (*Id.*)

6 For the remainder of the 2012/13 storm season, storm water accumulating within  
7 Dominguez Loop was pumped by the 6-inch pipe to either Basin A or Basin B. (Van Veldhuizen  
8 Decl. at ¶ 18.) If Basin A had capacity and was not in the process of actively treating storm  
9 water, water was pumped to Basin A. (*Id.*) If Basin A did not have capacity, water was pumped  
10 to Basin B and stored until such time that the water was pumped to Basin A for pre-treatment and  
11 settlement. (*Id.*) The chemical additive Chitosan was added to the water in Basin A to aid in  
12 flocculation of the sediment particles. (*Id.*) Once the appropriate amount of flocculation had  
13 occurred, sediment settled out within the basin. (*Id.*) Water was then transferred to a series of  
14 baker tanks for additional ATS treatment and then was finally processed through a series of sand  
15 filters that removed the remaining sediment and the chemical additive prior to discharge. (*Id.*)

16 For the end of last rain season, the treatment system worked as intended and in  
17 compliance with the ATS requirements indicated in the Construction Stormwater General Permit.  
18 (*See accord* Prosecution Team Exhibits 34-38, 42.) (Van Veldhuizen Decl. at ¶ 19.) For the  
19 upcoming rain season, the large permanent detention basin will be finalized and used to store any  
20 stormwater coming off of the whole site. (*Id.*)

21 Despite having many meetings with Regional Board staff and being very cooperative and  
22 open, Donahue Schriber and S.D. Deacon were unable to come to an acceptable settlement of this  
23 matter. S.D. Deacon's challenge to this enforcement action mainly hinges on the ACL  
24 Complaint's inconsistency with the State Water Board's Enforcement Policy and its requirements  
25 related to assessments of penalties on a dollars per gallon basis. (*See* Van Veldhuizen Decl. at ¶  
26 20; Exhibit D (Enforcement Policy) at p. 14; *see also* comment letters filed with the Advisory  
27 Team from the Building Industry Legal Defense Foundation (Sept. 3, 2013), and from the  
28 Associated General Contractors of California (August 1, 2013).) Had the proposed penalty been



1 more reasonable and consistent with the Enforcement Policy and other ACLs in this region and  
2 statewide, S.D. Deacon would not have requested Designated Party status and this hearing may  
3 not have been necessary. (See Van Veldhuizen Decl. at ¶ 20; Exhibits E-G (other ACLs).)

4 **B. RELEVANT LEGAL BACKGROUND**

5 1. The 2010 Enforcement Policy's Per Gallon Assessment

6 In 2009, the State Water Resources Control Board ("SWRCB") updated and adopted its  
7 2002 Enforcement Policy, which was approved by the Office of Administrative Law on May 20,  
8 2010. (See Exhibit D (2010 Enforcement Policy), attached to Van Veldhuizen Decl.) One of the  
9 modifications to that policy was to move away from using the statutory maximum amount of  
10 \$10.00 per gallon set under Water Code section 13385(c)(2)<sup>4</sup> for the baseline penalty calculation  
11 for certain categories of discharges because historic penalty actions for certain types of discharges  
12 (stormwater discharges, and sewer and recycled water spills) were previously set too high for  
13 these categories. (Compare to 2002 Enforcement Policy using \$10 per gallon, which can be  
14 found at the following site:

15 ([http://www.swrcb.ca.gov/water\\_issues/programs/enforcement/archived.shtml](http://www.swrcb.ca.gov/water_issues/programs/enforcement/archived.shtml) at p. 22 ("Up to  
16 \$10,000 per day of violation plus an additional liability of \$10 per gallon for each gallon over  
17 1,000 gallons where there is a discharge that is not cleaned up.")(emphasis added).) The result  
18 was the following language related to a *lower per gallon amount* imposed for discharges of  
19 stormwater, recycled water, and sewer spills larger than 1000 gallons:<sup>5</sup>

20 "The Water Boards shall apply the above per gallon factor to the maximum per gallon  
21 amounts allowed under statute for the violations involved. Since the volume of sewage spills and  
22 releases of stormwater from construction sites and municipalities can be very large for sewage  
spills and releases of municipal stormwater or stormwater from construction sites, a maximum

23 <sup>4</sup> Water Code section 13385(c) states: "Civil liability may be imposed administratively by the state board or a  
24 regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the  
sum of both of the following:

25 (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

26 (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and  
the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars  
27 (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

28 <sup>5</sup> Arguably, any discharges above 1000 gallons should be considered "high volume discharges" under the 2010  
Enforcement Policy since gallonage below that amount is not charged any per gallon penalty. (See accord Water  
Code section 13385(c)(2); Exhibit D at p. 14.)

1 amount of \$2.00 per gallon should be used with the above factor to determine the per gallon  
2 amount for sewage spills and stormwater. Similarly, for releases of recycled water that has been  
3 treated for reuse, a maximum amount of \$1.00 per gallon should be used with the above factor.  
4 Where reducing these maximum amounts results in an inappropriately small penalty, such as dry  
5 weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to  
6 the maximum per gallon amount, may be used.” (See Exhibit D at p. 14 (emphasis added).)

7 2. The 2010 Enforcement Policy’s Consistency Requirements

8 The 2010 Enforcement Policy contains numerous references to the requirement and goal  
9 that Water Board enforcement actions throughout California be consistent. (See accord Exhibit D  
10 (Enforcement Policy) at p. 1 (“Timely and consistent enforcement of these laws is critical”;  
11 “create a fair and consistent statewide approach to liability assessment”); p. 2 (Chapter Heading -  
12 “FAIR, FIRM, AND CONSISTENT ENFORCEMENT”; “Water Boards shall strive to be fair,  
13 firm, and **consistent**”; “Water Board orders shall be consistent”; “Water Boards shall implement  
14 a **consistent** and valid approach”; “providing consistent treatment for violations that are similar  
15 in nature”); p. 9 (“the public expect them to fairly and **consistently** implement”); p. 10 (“it is a  
16 goal of this Policy to establish broad consistency in the Water Boards’ approach to  
17 enforcement”; “provide a **consistent** approach and analysis of factors to determine administrative  
18 civil liability”; “a **consistent** outcome can be reasonably expected using this Policy”; “Be  
19 assessed in a fair and **consistent** manner”; “this chapter provides the decision-maker with a  
20 methodology for arriving at a liability amount **consistent** with these objectives”); p. 32 (“In order  
21 to provide a **consistent** approach to enforcement throughout the State, enforcement orders shall  
22 be standardized to the extent appropriate.”).) Thus, the Enforcement Policy requires that the  
23 Regional Board ensure that this ACL imposes a penalty similar to those imposed in other  
24 construction stormwater matters, and that the liability factors are determined in a manner  
25 consistent with the express goals and intent of the 2010 Enforcement Policy. The currently  
26 proposed ACL No. R5-2013-0519 fails to meet this consistency requirement.

27 C. **THE PROPOSED ACL IS INCONSISTENT WITH THE CLEAR TERMS OF THE**  
28 **ENFORCEMENT POLICY RELATED TO PER GALLON ASSESSMENTS.**

In the proposed discretionary penalty for the alleged discharge violations in ACL No. R5-  
2013-0519 against Donahue Schriber, the Prosecution Team used \$10 per gallon to compute the  
base liability amount. (See ACL No. R5-2013-0519, Prosecution Team Exhibit 13, at pp. 7-8,

1 and Attachment A at pp. 3-4.) The justification for the use of this amount was as follows:

2 “An estimated volume of 76,613 gallons of turbid storm water was discharged from two  
3 locations on 30 November 2012. The maximum civil liability allowed under Water Code  
4 section 13385 is \$10 per gallon for discharges. While the Enforcement Policy states that a  
5 lower initial per-gallon value may be used for “high volume” discharges, for this case,  
6 Water Board staff do not recommend using less than \$10/gallon in the initial penalty  
7 calculation, given the relatively small volume of discharge on 30 November 2012 and the  
8 beneficial uses of the receiving water.” (*Id.* at p. 3.)

9 The statutory maximum of \$10 per gallon should not have been used in this case. Instead,  
10 the Enforcement Policy makes clear that, for sewage spills and stormwater, a maximum of \$2 per  
11 gallon should be used. This is the mandate *unless* findings have been made, supported by  
12 reasoning and evidence cited in the ACL Complaint, that the penalty is inappropriately small and  
13 that the discharge was either a dry weather discharge or a small volume discharge that impacts  
14 beneficial uses. In this case, for the reasons set forth below, S.D. Deacon respectfully requests  
15 that the proposed penalty be recalculated consistent with the requirements of the Enforcement  
16 Policy, using \$2 per gallon.

17 **D. THE PROSECUTION TEAM FAILED TO PROVE ANY HARM TO BENEFICIAL USES**  
18 **OR PROVIDE ANY JUSTIFICATION FOR A HIGHER PER GALLON AMOUNT.**

19 The Enforcement Policy only allows a maximum per gallon amount for stormwater  
20 discharges above the mandated \$2 per gallon “[w]here reducing these maximum amounts results  
21 in an inappropriately small penalty, such as dry weather discharges or small volume discharges  
22 that impact beneficial uses.” (*See* Exhibit D at p. 14 (emphasis added).) The Prosecution Team  
23 failed to demonstrate that the use of \$2 per gallon in its calculation would result in an  
24 “inappropriately small penalty.” Further, the discharge in question was not a “dry weather  
25 discharge” since it occurred during a very large rain event. (*See* Van Veldhuizen Decl. at ¶¶ 11-  
26 13.) Finally, the Prosecution Team failed to demonstrate this was a “small volume discharge” or  
27 that the discharge would “impact beneficial uses.” In fact, S.D. Deacon and Donahue Schriber’s  
28 fisheries expert in this case, Dr. Michael Bryan, concluded that “level of impact, should any  
impact to aquatic life have occurred, would have been sufficiently small in magnitude, duration,  
and geographic extent that no appreciable harm to any of the populations of aquatic organisms  
using Secret Ravine would have occurred.” (*See* Donahue Schriber’s Exhibit I at p. 11; *see also*

1 Exhibit J (CV of Dr. Michael Bryan).)

2 Finally, *even if* such a demonstration had been made by the Prosecution Team, they  
3 provided no justification whatsoever why the maximum per gallon amount of \$10 per gallon was  
4 used instead of some amount between \$2 and \$10 per gallon. (See Exhibit 13, Attachment A;  
5 Exhibit D (Enforcement Policy)(if justification demonstrated, “a higher amount, up to the  
6 maximum per gallon amount, may be used.”)(emphasis added).) There is no justification for a  
7 \$10 per gallon amount, particularly when the Prosecution Team’s calculated a Harm Factor of 6  
8 only equates to a harm factor of *moderate*, not high, and does not provide justification for a  
9 higher per gallon penalty amount. Further, according to the S.D. Deacon and Donahue Schriber’s  
10 fisheries expert in this case, the more accurate harm factor is minor, not moderate. (See Exhibit I  
11 at p. 10-11.) Thus, no justification has been provided or exists for exceeding the Enforcement  
12 Policy’s mandated maximum of \$2 per gallon for stormwater discharges.

13 **E. THE PROPOSED PENALTY IS INCONSISTENT WITH OTHER RECENT CENTRAL**  
14 **VALLEY REGIONAL BOARD ACLS AND ACL PENALTIES STATEWIDE.**

15 Not only is the Regional Board’s proposed ACL contrary to the Enforcement Policy, it is  
16 also inconsistent with other recent penalty actions in the Central Valley Region. In the recent  
17 enforcement action for the Cascade Crossing construction site, ACL No. R5-2013-0520, which  
18 occurred during the same large rain event as the one in this case, the Prosecution Team for that  
19 matter used \$2.00 per gallon, not \$10 per gallon. (See Exhibit E to Van Veldhuizen Decl., ACL  
20 No. R5-2013-0520 at Attachment A, p. 2.) The following justification was provided in that case:

21 “Because of the volume of the discharge, it is considered a “high volume discharge” under  
22 the Enforcement Policy. For high volume discharges, the Enforcement Policy allows a  
23 civil liability value of either \$2 per gallon (for sewage) or \$1 per gallon (for recycled  
24 water) instead of the maximum civil liability of \$10 per gallon allowed under Water Code  
section 13385. In this case, it is appropriate to use the \$2 per gallon value in calculating  
the liability because of the high volume.”

25 While part of the penalty in Cascade Crossing was for a larger discharge event of 193,500  
26 gallons, the Regional Board also used \$2/gallon for a smaller discharge event of 37,500 gallons,  
27 about half the size of the event at issue for Rocklin Crossings. (See Exhibit E at Attachment A, p.  
28 3.) Thus, the size of the event in the Rocklin Crossings case at issue should not be used as a

1 justification to vary from the clear mandate in the Enforcement Policy to use \$2 per gallon for  
2 stormwater discharges exceeding 1000 gallons. (*See also accord* Exhibit F to Van Veldhuizen  
3 Decl., Placentia-Yorba Linda Unified School District, ACL No. R8-2010-0024 at Attachment A  
4 (applying \$2 per gallon to discharge of 55,887 gallons).)

5 All discharge penalties in similar construction stormwater matters should be determined in  
6 a manner consistent with the express goals and intent of the 2010 Enforcement Policy. The  
7 currently proposed ACL No. R5-2013-0519 fails to meet that consistency requirement. Every  
8 construction stormwater ACL penalty found in California that was imposed after adoption of the  
9 2010 Enforcement Policy, except one,<sup>6</sup> has used \$2.00 per gallon as the starting point for  
10 calculating base liability. However, even in the one instance where more than two dollars per  
11 gallon amount was used (and higher culpability and history of violation factors were imposed),  
12 the final penalty was \$197,367, which is *less* than the \$211,038 amount proposed against  
13 Donahue Schriber for a smaller discharge volume. In addition, in the one matter where \$2 per  
14 gallon was not used, Region 8 did not automatically jump from \$2 per gallon to the maximum of  
15 \$10 as was done in Donahue Schriber's case, but used a lower amount of three dollars per gallon.  
16 (*See id.* (R8-2010-0025).)

17 For the reasons set forth above, ACL No. R5-2013-0519 must be recalculated using a  
18 \$2.00 per gallon base amount in order to be consistent with the Enforcement Policy and with  
19 other ACLs issued both statewide and in this region.

20 **F. THE REGIONAL BOARD MUST ADJUST THIS ACL TO ENSURE STATEWIDE**  
21 **CONSISTENCY.**

22 Principles of due process and equal protection require fundamental fairness in  
23

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24 <sup>6</sup> The only exception was in the enforcement action against EI-PLA 75, LLC, ACL No. R8-2010-0025 (Exhibit G to  
25 Van Veldhuizen Decl.), where Region 8 used \$3.00 per gallon. In the EI-PLA matter, the situation was  
26 distinguishable because the discharge was larger (101,631 gallons) and the ACL followed a number of enforcement  
27 actions against the discharger by the City of Placentia (*see* ACL Order No. R8-2010-0025 at p. 2, para. 5.b.), two  
28 Stop Work Orders, a Cease and Desist Order, two citations totaling \$300 (*id.*), and two Notices of Violation from the  
Santa Ana Regional Board (*id.* at pg. 3, para. 5.d. and pg. 4, para. 5.k.). That Complaint cited a litany of alleged  
violations, including failing to employ effective erosion and sediment controls despite numerous previous warnings  
and inspections, and failing to implement effective tracking and perimeter controls, effective trash and waste  
management controls, and adequate storm drain protection among other violations. (*See id.* (R8-2010-0025).)  
Similar facts are not present in the Rocklin Crossings matter.

1 adjudicatory hearings, and also require that persons subject to legislation or regulation that are in  
2 the same circumstances be treated alike. (U.S. Const. amend. XIV, §1; Cal. Const. art. I, §§ 7,  
3 15.) When comparing the Rocklin Crossings ACL to others in the Central Valley Region or  
4 elsewhere in the state, the Regional Board is not be treating similar discharges similarly. The  
5 proposed ACL penalty is neither fair nor consistent with other recent enforcement actions under  
6 similar laws. Such differential treatment raises issues of equal protection and fundamental  
7 fairness. In this case, Donahue Schriber is being punished more harshly than other similar  
8 situated construction stormwater dischargers without adequate justification, thereby potentially  
9 violating constitutional equal protection requirements.

10 The Regional Board must modify the Rocklin Crossings ACL to be consistent with other  
11 similar discharges using the clear terms of the 2010 Enforcement Policy, which explicitly states  
12 that: “[e]xamples of circumstances warranting an adjustment under this step are: c. The  
13 calculated amount is entirely disproportionate to assessments for similar conduct made in the  
14 recent past using the same Enforcement Policy.” (See Enforcement Policy at pg. 19 (Step 7 –  
15 Other Factors as Justice may Require).)

### 16 **III. PERCIPIENT WITNESS DESIGNATION**

17  
18 S.D. Deacon designates the following percipient witnesses to testify at the upcoming  
19 hearing:

20 1. **Mr. Robert Aroyan** – Mr. Aroyan can and will testify about S.D. Deacon and the  
21 overview of this construction project. (5 minutes for direct testimony)

22 2. **Mr. Andy Van Veldhuizen** – Mr. Van Veldhuizen can and will testify about the  
23 Rocklin Crossings construction site, the Storm Water Pollution Prevention Plan (SWPPP) and  
24 BMPs for that site, pre-storm preparations, events during and after the 2012 rain event, and other  
25 issues raised in the ACL Complaint and/or his declaration. (5-10 minutes for direct testimony)

### 26 **IV. EXPERT WITNESS DESIGNATION**

27 S.D. Deacon jointly designates the following expert witness with Donahue Schriber to  
28 testify in the hearing on this matter:

1. **Dr. Michael Bryan** will testify related to the lack of evidence of harm to beneficial uses from this temporary upset event where the site's BMPs failed due to excessive rain in a short period of time. Dr. Bryan's qualifications to opine on this issue include over 25 years of combined consulting and research experience primarily in water quality, toxicology, and fisheries biology. Dr. Bryan has extensive expertise in data compilation and analysis, and permitting—particularly NPDES permitting. Dr. Bryan applies his expertise to assist clients with strategic planning; compliance monitoring; technical evaluations; project refinement, permitting, and implementation; and, when needed, expert witness testimony. Recent work is focused on assessing the effects of effluent discharges on aquatic habitats, and resultant impacts to aquatic resources and other beneficial uses. Currently, Dr. Bryan is working with the Central Valley Regional Water Quality Control Board staff to develop and process Region-wide amendments to the Central Valley Water Quality Control Plan (Basin Plan) for pH and turbidity. Dr. Bryan's resume and credentials were provided by Donahue Schriber in Exhibit J and are incorporated by reference herein.

## V. CONCLUSION

For the reasons set forth above, S.D. Deacon requests that the Regional Board members reconsider the proposed penalty and make any final ACL penalty decision more consistent with the language and intent of the 2010 Enforcement Policy and with other ACLs issued thereunder in this Region and around the State.

Respectfully submitted,

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